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OFFICE OF THE CLERK

No. ——

In The

Supreme Court of the United States

October Term, 1997

In re RICHARD A. COLE, M.D.,

Petitioner.

On Petition For The Extraordinary
Writ Of Habeas Corpus
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR EXTRAORDINARY WRIT OF HABEAS CORPUS

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31pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a hearing should be denied a habeas corpus petitioner who has raised issues of ineffective defense counsel, bias and prejudice of the magistrate judge who issued the search warrant, bias and prejudice of both officers who swore to that warrant, perjury of one of those same officers, and bias and prejudice of the trial judge, the same judge who refused to grant an evidentiary hearing on the habeas corpus petition. None of these issues have been heard in open court, but rather dismissed for the disputed failure of petitioner to file his brief on time in the appeals court.

2. Whether it is fundamentally unfair and a denial of due process of law to deprive appellant of a hearing in the district court on a habeas corpus petition wherein he alleges ineffective defense counsel who failed to challenge a search and seizure warrant for bias and prejudice of the magistrate who issued the warrant, bias and prejudice of the two officers who swore to the affidavit underlying the warrant, documented perjury of one of those officers about her role in the case, and bias and prejudice of the trial judge. Not only was no hearing given in the district court, but no Answer was required of the government. This same petition was later dismissed without a hearing by the appeals Court Clerk for alleged failure to file a brief which was contested by appellant.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 2

REASONS WHY THE EXTRAORDINARY WRIT OF HABEAS CORPUS SHOULD BE GRANTED 4

I. Petitioner has never had a hearing on his challenge to the constitutionality of his conviction. He has raised issues of ineffective defense counsel, bias and prejudice of the magistrate judge who issued the search warrant, bias and prejudice of both officers who swore to that warrant, perjury of one of those same officers, and bias and prejudice of the trial judge, the same judge who refused to grant a hearing on the habeas corpus petition. None of these issues have ever been heard in open court, but rather dismissed for the disputed failure of petitioner to file his brief on time in the appeals court 4

II. The District Court failed to give Cole an evidentiary hearing of his habeas corpus petition in violation of 28 U.S.C. section 2255 which authorizes a hearing when there are factual matters in dispute which are not on the record. There has never been an examination of ineffective assistance of counsel in this case 7

CONCLUSION 10

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953) 8

Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969) 5, 7, 8

Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) 8

Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) 9

Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948) 7

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) 8

CONSTITUTION, STATUTES AND RULES

U.S. CONSTITUTION, Article I, Section 9, Clause 2 ..... 4, 5

28 U.S.C. section 1651 1

28 U.S.C. section 2255 ..... 1, 2

Federal Rule of Civil Procedure 60(b) 3

Federal Rules of Appellate Procedure, Third Circuit Local Rule 107.2 2

OPINIONS BELOW

Cole v. U.S.A., USDC WD Pa. Civil Action No. 94-164E (part of Crim. No. 91-28E), July 8, 1994

Cole v. U.S.A., USCA 3rd Docket No. 94-3613, CLERK ORDER, Dec. 30, 1994

Cole v. U.S.A., USCA 3rd Docket No. 94-3613, March 26, 1997

Cole v. U.S.A., USCA 3rd Docket No. 94-3613, May 6, 1997

JURISDICTIONAL STATEMENT

This case was filed in the United States District Court for the Western District of Pennsylvania based on the court's jurisdiction pursuant to 28 U.S.C. section 2255 since it had heard the underlying criminal case, *U.S.A. v. Cole*, USDC WD Pa. Crim. No. 91-28E. The United States Court of Appeals for the Third Circuit rendered its decision by a CLERK ORDER on December 30, 1994. A motion to recall the mandate was filed on October 18, 1996 which was denied on March 26, 1997. A petition for rehearing was filed on April 9, 1997 which was denied on May 6, 1997. A Petition for Writ of Certiorari was filed in this Court on June 7, 1997, *Cole v. U.S.A.*, Docket No. 96-1956. It was denied on October 6, 1997. A petition for rehearing was filed in this Court on October 16, 1997, and was denied on November 10, 1997. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1651.

STATEMENT OF THE CASE

Richard A. Cole, M.D., petitions this Court for an extraordinary writ of habeas corpus in this case since all other avenues have unfairly blocked petitioner on the issue of obtaining a hearing on the merits of his habeas corpus petition (motion under 28 U.S.C. section 2255, A.10a). Cole originally filed his habeas corpus petition on April 22, 1994 in the United States District Court for the Western District of Pennsylvania. It was dismissed without a request for an Answer from the government, without a hearing, and without an explanation on July 8, 1994. Cole appealed to the United States Court of Appeals for the Third Circuit in Philadelphia on July 25, 1994, but his appeal was not docketed until November 9, 1994. Cole was told to file his brief in this case by December 16, 1994. Cole, who was in prison at the time, and did not have the funds to make copies, sent his brief to his sister-in-law, Sylvia Cole, to make copies and send them to the Appeals Court. She did this and filed the appropriate brief and copies via Federal Express courier on November 25, 1994. Further, she called Federal Express to make sure they had been delivered, and this was confirmed (Appendix page 7a). Inexplicably on January 3, 1995, Cole received notice via CLERK ORDER (Appendix page 3a) that his appeal had been dismissed for failure to timely prosecute based on Local Rule 107.2 (Appendix page 12a) because Cole had allegedly not filed his brief on time. Cole filed a motion to reinstate the appeal which he sent to Sylvia Cole who made the appropriate number of copies and again sent them to the Clerk's Office via Federal Express. She checked with Federal Express and the Clerk's Office to ensure delivery, and both confirmed

that the papers had arrived at the Clerk's Office (Appendix page 7a). Nevertheless, the motion to reinstate the appeal was never heard.

Cole, a pro se litigant, had no idea what to do next, and so filed a second habeas corpus petition in an attempt to have the merits of his petition heard. This second petition was dismissed because Cole could not bring up the same arguments on a second petition after the first petition was dismissed. The district court criticized Cole for failing to prosecute his first appeal. Thereupon Cole filed a motion under Federal Rule of Civil Procedure 60(b) in the United States Court of Appeals for the Third Circuit asking to set aside the judgment dismissing the appeal of the habeas corpus petition, since it was fraud upon the court to dismiss the appeal when Cole had shown by declaration of his sister-in-law that she had served the brief and the motion to reinstate the appeal via Federal Express, and that she had spoken to Federal Express and the Clerk's Office, and they both had assured her that all was in order (Appendix page 7a).

The Appeals Court considered this motion under Rule 60(b) to be a motion to recall the mandate. The government filed a brief in support of considering the appeal on the issue of bias and prejudice of the magistrate. Despite all this, the Appeals Court refused to reinstate the appeal saying that it was untimely filed pursuant to Local Rule 107(a). Cole filed a petition for rehearing and rehearing en banc, and this was likewise denied.

In his habeas corpus petition, Cole raised four major issues of constitutional dimension: 1. ineffective assistance of counsel, 2. bias and prejudice of the magistrate

who issued the search and seizure warrant as well as the two officers who swore to the affidavit underlying the warrant, 3. documented perjury of one of the officers who lied about her activity with Cole in a related Drug Enforcement Agency hearing, and 4. bias and prejudice of the trial court judge. None of these issues have ever been heard by any court, nor has any evidentiary hearing ever been held on these matters despite the fact that they had not been fully developed in the record of this case.

REASONS WHY THE EXTRAORDINARY WRIT OF HABEAS CORPUS SHOULD BE GRANTED

I. PETITIONER HAS NEVER HAD A HEARING ON HIS CHALLENGE TO THE CONSTITUTIONALITY OF HIS CONVICTION. HE HAS RAISED ISSUES OF INEFFECTIVE DEFENSE COUNSEL, BIAS AND PREJUDICE OF THE MAGISTRATE JUDGE WHO ISSUED THE SEARCH WARRANT, BIAS AND PREJUDICE OF BOTH OFFICERS WHO SWORE TO THAT WARRANT, PERJURY OF ONE OF THOSE SAME OFFICERS, AND BIAS AND PREJUDICE OF THE TRIAL JUDGE, THE SAME JUDGE WHO REFUSED TO GRANT A HEARING ON THE HABEAS CORPUS PETITION. NONE OF THESE ISSUES HAVE EVER BEEN HEARD IN OPEN COURT, BUT RATHER DISMISSED FOR THE DISPUTED FAILURE OF PETITIONER TO FILE HIS BRIEF ON TIME IN THE APPEALS COURT.

A habeas corpus petition is a sacred right that the founders of this country sought to ensure by providing in the Constitution that the right to habeas corpus would not be suspended except in times of insurrection. U.S. Constitution, Article 1, Section 9, Clause 2. The habeas

corpus petition is the last bastion available to Cole to challenge the Constitutional validity of his conviction. Rather than having a reasoned review of Cole's allegations, Cole has been dismissed by the Clerk pursuant to a local rule which allows the Clerk to dismiss a case for failure to file a brief on time (A. 12a). This Court has repeatedly stated that the writ must be administered with initiative and flexibility to insure that miscarriages of justice within its reach are surfaced and corrected.

> "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended * * * .' U.S. Const., Art. I, § 9, cl.2. The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286 at 291, 89 S.Ct. 1082 at 1086, 22 L.Ed.2d 281 (1969).

Cole did in fact file his brief on time, and supplied a declaration from his sister-in-law to establish this (A.7a). Logically, it would be incomprehensible to think that a prisoner who was attempting to gain his freedom would not file on time. Cole had no more pressing matters than

filing his brief, and ensured that it was filed on November 25, 1994, well before the deadline of December 16, 1994.

The presumed argument of the Appeals Court is that it must keep its dockets clear of cases which are not actively prosecuted. While this may seem reasonable, Cole argues it is fundamentally unfair and a denial of Cole's right to due process of law to dismiss Cole's appeal by saying that he did not file his brief especially when there is a disputed fact as to whether or not it was filed (Declaration of Sylvia Cole, A.7a). It is a further denial of due process to deny Cole a hearing or even an adjudication on his motion to reinstate his appeal. Notably, as can be seen in the appeals court docket in the appendix, Cole's record was sent back on the day the appeal was dismissed without even waiting for Cole to file a motion to reinstate the appeal (A.14a).

How could any logical person believe that a prisoner would not pursue a habeas corpus appeal? Furthermore, under Local Rule 107.2(a) (A.12a), the Clerk has the obligation of informing the appellant of any deficiency in the filing, and giving him time to correct it. Rather than informing Cole of the alleged deficiency, Cole was summarily dismissed by the Clerk of Court without warning, and not even given the chance to have a motion for reinstatement heard. This Court has objected to such procedure in the past stating:

> "And this Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in

> his petition, that a habeas corpus proceeding must not be allowed to founder in a 'procedural morass.' " *Harris v. Nelson*, supra at 394 U.S. 291, quoting *Price v. Johnston*, 334 U.S. 266, 269, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948).

All of this is fundamentally unfair in any proceeding, and is especially unconscionable and repugnant to the Constitution in matters of habeas corpus where the emphasis is on seeking justice regardless of procedural flaws. In this case, Cole argues that he has followed all the rules, and the Clerk has risen to status not envisioned by the Congress or the founders of this country to sit in judgment of Cole.

II. THE DISTRICT COURT FAILED TO GIVE COLE AN EVIDENTIARY HEARING OF HIS HABEAS CORPUS PETITION IN VIOLATION OF 28 U.S.C. SECTION 2255 WHICH AUTHORIZES A HEARING WHEN THERE ARE FACTUAL MATTERS IN DISPUTE WHICH ARE NOT ON THE RECORD. THERE HAS NEVER BEEN AN EXAMINATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE.

Cole has alleged four major errors of Constitutional magnitude, none of which has ever been heard in open court.

First, ineffective defense counsel failed to investigate and challenge the validity of the search and seizure warrant issued against Cole. Second, ineffective defense counsel failed to investigate and challenge the bias and prejudice of the magistrate judge, and the two officers who swore to the affidavit underlying the warrant. Third,

ineffective defense counsel failed to investigate and challenge the testimony of one of the officers who swore to the affidavit for the warrant when she was shown in a related Drug Enforcement Agency hearing to have lied about the same matters. Fourth, ineffective defense counsel failed to investigate and challenge the bias and prejudice of the trial judge.

All these are material facts for which Cole deserves a hearing. This Court has stated that under these circumstances, a petitioner has a right to a hearing.

> "It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing." *Harris v. Nelson*, supra at 394 U.S. 292, quoting *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *Brown v. Allen*, 344 U.S. 443, 464, No. 19, 73 S.Ct. 397, 97 L.Ed. 469 (1953).

Cole was denied due process of law by the district court's failure to give Cole a hearing on these material issues which were not fully developed in the record because of the ineffective assistance of Cole's defense counsel.

The government's first objection is that Cole waived all rights to relief by pleading guilty in this matter. Cole only plead guilty on the eve of trial, after a jury was selected, because Cole's counsel suddenly told him that he had no defense for Cole, and that Cole should plead guilty. Law set down by the Court in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), held that where defense counsel's standard of performance fails

that expected, a guilty plea cannot be considered as well informed.

> "Where defendant enters a guilty plea upon counsel's advice, the voluntariness of plea depends on whether advice was in the range of competence demanded of attorneys in criminal cases." Ibid.

In the instant case, had Cole's counsel done his job, the search and seizure would have been rendered illegal and there would be no evidence to move this case forward. Cole would have been acquitted. Cole was severely prejudiced by his counsel who failed to give Cole competent service. The challenge of a search warrant is an elemental duty. There was no tactical reason to excuse challenging the warrant in this case. This Court has determined that failure to file a timely motion to suppress evidence based on an illegal search in similar circumstances constitutes ineffective assistance of counsel.

> "While the failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel, the record clearly reveals that respondent's attorney failed to file a timely suppression motion, not due to trial strategy considerations, but because he was unaware of the search, and of the State's intention to introduce the bedsheet into evidence, due to his failure to conduct any pretrial discovery. Such failure here was not, as required under *Strickland*, reasonable and in accord with prevailing professional norms." *Kimmelman v. Morrison* (1986), 477 U.S. 365 at 367, 106 S.Ct. 2578, 91 L.Ed.2d 305.

Further, Cole's habeas corpus petition was denied by the same trial judge whom Cole has accused of bias and

prejudice. Logically, how can such a trial judge in good conscience also evaluate the merits of a habeas petition wherein his impartiality has been challenged? This same judge denied the habeas corpus petition without a hearing further suggesting his bias and prejudice.

Cole argues that all these issues should be heard in open court. In fact, all of these issues have been buried. The district court refused to address them, or even allow the government to address them, and waited months before dismissing the petition. Later, the appeals court was tardy in docketing the appeal, and after Cole filed his brief, the Appeals Court Clerk denied receiving the papers.

Cole avers that this case represents a classic example of an attempt to avoid a hearing on the merits. All of the rules and guidelines for allowing a hearing have been broken, and Cole has been repeatedly denied an opportunity to be heard. All of this flies in the face of the statutory, Constitutional, and common law principles upon which a petition for habeas corpus is based, and this should be corrected by this Court.

CONCLUSION

Cole respectfully requests this Court to grant the extraordinary writ of habeas corpus in this matter so that an evidentiary hearing on the merits of Cole's case can finally be heard in the district court before a judge other than the trial judge. Thus far, Cole has been blocked from a hearing in the district court and the appeals court, all in

violation of fundamental fairness, and Cole's right to due process of law.

This case offers this Court the opportunity to circumscribe the power of the Clerk of the Appeals Court, who now according to this case, has unfettered power to adjudicate habeas corpus petitions based on whims and vagaries of bureaucratic rules leaving petitioners with no realistic method to challenge such decisions. To let this case remain would provide a precedent for completely eroding the right to writ of habeas corpus since all petitions in the future could be dismissed for alleged lack of receipt of papers, and be forever buried without justice being served.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated December 22, 1997

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Page

APPENDIX A
Order of the United States Court of Appeals for the Third Circuit denying motions 1a

APPENDIX B
Order of the United States Court of Appeals for the Third Circuit 3a

APPENDIX C
Order of the United States District Court for the Western District of Pennsylvania 4a

APPENDIX D
Denial of Petition for Rehearing from the United States Court of Appeals for the Third Circuit 6a

APPENDIX E
Declaration of Sylvia Cole in Support of Petition for Rehearing En Banc 7a

APPENDIX F
28 U.S.C. § 2255 ..... 10a

APPENDIX G
Miscellaneous Local Appellate Rules for United States Court of Appeals for the Third Circuit 12a

APPENDIX H
Docket
94-3613 USA v. Cole 14a

APPENDIX A

February 6, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
C.A. No. 94-3613

UNITED STATES OF AMERICA

vs.

RICHARD A. COLE, ET AL.

(W.D.PA. CRIM. NO. 91-CR-00028)
(CRIMINAL TREATED AS CIVIL)

Present: GREENBERG, NYGAARD and ROTH, *CIRCUIT JUDGES*

Submitted are:

(1) Appellant's motion to reopen the above-captioned appeal; and

(2) Appellee's "Motion to Expedite Proceedings and Motion for Summary Action"

in the above captioned case.

Respectfully,

/s/ P. Douglas Sisk/WMH
P. DOUGLAS SISK
CLERK

ORDER

The foregoing motion to reopen the above captioned appeal is denied as it was filed untimely. LAR Misc. 107.2(a). The government's motion to expedite and to affirm summarily are denied as moot.

By the Court,

/s/ M.A. Greenberg
M.A. GREENBERG
CIRCUIT JUDGE

Dated March 26, 1997

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3612

USA

vs.

Cole

Richard A. Cole, Appellant
(Western District of Pennsylvania
Civil No. 91-cr-00028E)

ORDER

Pursuant to Rule 3(a) of the Federal Rules of appellate Procedure and Third Circuit LAR Misc. 107.2,

It is ORDERED that the above-entitled case is hereby dismissed for failure to timely prosecute;

It is FURTHER ORDERED that a certified copy of this order be issued forthwith as the mandate.

For the court,
/s/ illegible
Acting Clerk

Date: December 30, 1994

cc: Mr. Richard A. Cole
Bonnie R. Schlueter, Esq.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD A. COLE, M.D.	)	
	)	
Plaintiff,	)	CIVIL ACTION
v.	)	NO. 94-164E
UNITED STATES OF AMERICA,	)	CRIMINAL
	)	NO. 91-28E
Defendant.	)	

ORDER

AND NOW, to-wit, this 8th day of July, 1994, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Motion to Amend Habeus Corpus Petition (Doc. 141) be and the same hereby is DENIED;

2. Motion to Vacate (Doc. 138) be and the same hereby is DENIED;

3. Motion for Recusal of Judge Cohill under 28 U.S.C. sections 144 and 455 (Doc. 141) be and the same hereby is DENIED;

4. Motion for Recusal of Judge Cohill from All Proceedings (Doc. 141) be and the same hereby is DENIED.

5. Motion to Vacate All Judgments, Orders and Decrees Against Plaintiffs (Doc. 141) be and the same hereby is DENIED.

/s/ Maurice B. Cohill, Jr.
MAURICE B. COHILL, JR.
JUDGE

cc: Richard A. Cole, M.D.
Reg. No. 10509-068
BHM-H FPC Maxwell AFB
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Asst. United States Attorney

APPENDIX D

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 94-3613

UNITED STATES OF AMERICA

vs.

RICHARD A. COLE, ET AL.,

Appellant

On appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 91-00028)

SUR PETITION FOR REHEARING
BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, *Circuit Judges*

The petition for rehearing filed by the appellant, Richard A. Cole, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for a rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:
/s/ M.A. Greenberg
M.A. GREENBERG
CIRCUIT JUDGE

Dated May 6, 1997

APPENDIX E

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APPEARING PRO SE FOR APPELLANT

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

RICHARD A. COLE, M.D., Appellant/Petitioner VS. UNITED STATES OF AMERICA, Appellee/Respondent	DOCKET NO. 94-3613 DECLARATION OF SYLVIA COLE IN SUPPORT OF PETITION FOR REHEARING EN BANC

I, Sylvia Cole, declare as follows:

1 . . . I have personal knowledge of the facts stated herein, and if necessary, can competently testify thereto.

2 . . . I served as the mailing agent for my brother-in-law, Richard A. Cole, M.D., during the period of April 20, 1993, to October 5, 1995, while Doctor Cole was incarcerated at Federal Prison Camp, Maxwell Air Force Base, Montgomery, AL. I did so because, while incarcerated, Doctor Cole did not have the necessary funds to make copies, or afford postage to be able to communicate with the Courts of the United States.

3 . . . Thus Doctor Cole would send me material from Maxwell to be copied with instructions as to where, and how to sent it.

4 . . . On or about November 22, 1994, I received a packet of material from Doctor Cole containing, but not limited to, an appellant's brief for his appeal in the United States Court of Appeals for the Third Circuit, Docket No. 94-3613, a motion for an expedited appeal, and a motion for release to his own recognizance. I sent all this material plus my declaration: proof of service by mail to the Clerk of Court, United States Court of Appeals for the Third Circuit, Philadelphia, PA on Wednesday, November 23, 1994, via Federal Express for arrival on Friday, November 25, 1994, since Thursday was Thanksgiving Day. I called Federal Express on Friday, and they assured me that the package was delivered. I have attached a copy of the Federal Express receipt and tracking number.

5 . . . In early January 1995, Doctor Cole called me to tell me that his appeal, Docket No. 94-3613, had been dismissed on December 30, 1994, because of "failure to timely prosecute", and that none of the material I sent had been received. I called the Clerk's Office, and the spokeswoman said that it may have been "the one that was dismissed by accident". I was told that Doctor Cole could simply file a motion to have the dismissal set aside for good cause. I thereupon copied all the material sent earlier. Doctor Cole sent me the motion to set aside this dismissal, and I sent this along with the appellant's brief, motion for an expedited appeal, and my declaration: proof of service by mail to the Clerk of Court, U.S. Court of Appeals for the Third Circuit in Philadelphia, PA, via

Federal Express on Friday, January 6, 1995, for delivery on Monday, January 9, 1995.

6 . . . I called the Clerk's Office on Monday, January 9, 1995, to see if the material had been delivered, and was assured by the spokeswoman that all was in order. Despite the fact that I sent a request for a date stamped copy of the cover sheet of each of the documents when I sent the material, I never received any date stamped copies. I have attached the Federal Express receipt and tracking number.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Sylvia Cole
Sylvia Cole

Executed on April 8, 1997

APPENDIX F

Title 28. Section 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeus corpus.

An application for a writ of habeus corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

APPENDIX G

MISCELLANEOUS LOCAL APPELLATE RULES FOR UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LAR MISC. 107.0 SANCTIONS

107.2 Dismissal for Failure to Prosecute.

(a) When an appellant fails to comply with the Federal Rules of Appellate Procedure of the Local Appellate Rules of this Court, the Clerk shall issue written notice to counsel or to the appellant who appears pro se that upon the expiration of fourteen (14) days from the date of the notice, the appeal may be dismissed for want of prosecution unless appellant remedies the deficiency within that time. If the deficiency is not remedied within this period, the Clerk is authorized to dismiss the appeal for want of prosecution and issue a certified copy thereof to the Clerk of the district court as the mandate. The appellant shall not be entitled to remedy the deficiency after the appeal is dismissed except by the order of the Court. A motion to set aside such an order must be justified by the showing of good cause and may not be filed after ten (10) days of the date of dismissal. If the appeal is one taken from the District Court of the Virgin Islands, an additional ten (10) days shall be added to the time limits specified in this paragraph.

(b) Notwithstanding subsection (a), if an appellant fails to comply with the Federal Rules of Appellate Procedure and the Local Appellate Rules with respect to the timely filing of a brief and appendix, at any time after the seventh day following the due date, the Clerk is authorized

to dismiss the appeal for want of timely prosecution. The procedure to be followed in requesting an order to set aside dismissal of the appeal is the same as that set forth in subsection (a).

APPENDIX H

Proceedings include all events.
94-3613 USA v. Cole

11/9/94	CIVIL CASE DOCKETED. Notice filed by Richard A. Cole. (emp)
11/9/94	RECORD, filed. (Entire Record on 18th floor – 1 box) (emp)
11/9/94	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 12/19/94. (emp)
11/30/94	APPEARANCE from Attorney Bonnie R. Schlueter on behalf of Appellee USA, filed. (emp)
12/30/94	CLERK ORDER (LAR Misc 107.2 – Br/Apx): Procedurally Terminated Without Judicial Action; Default. (sdt)
12/30/94	Certified copy of Order sent to Clerk of District Court. (sdt)
12/30/94	RECORD RETURNED. (sdt)
10/18/96	MOTION by Appellant for Relief from Final Judgment Dismissing this Appeal for Failure to Timely Prosecute Under Authority of Fed. R. Civ. Proc. 60(b)(6), TREATED as a Motion to Reopen appeal, filed. Answer due 10/24/96. Certificate of Service dated 10/14/96. (jas)
11/25/96	RECORD, received. (jas)
1/30/97	MOTION by Appellee to expedite proceedings AND for Motion summary action, filed. Answer due 02/07/97. Certificate of Service dated 1/28/97. (jas)
2/12/97	RESPONSE by Appellant Richard A. Cole to motion to expedite appeal and motion

summary action, filed. Certificate of service dated 2/11/97. (jas)

3/26/97 ORDER (Greenberg, Authoring Judge, Nygaard, Roth, Circuit Judges) denying motion to reopen the appeal as it was untimely filed. LAR Misc. 107.2(a). Denying the government's motion to expedite and to affirm summarily as moot, filed. DPS-126 (rmg)

4/9/97 PETITION by Appellant Richard A. Cole, for rehearing in banc. Certificate of service dated 4/8/97, filed. (rmg)

5/6/97 ORDER (Sloviter, Chief Judge, Becker, Stapleton, Mansmann, Greenberg, authoring Judge, Scirica, Cowen, Nygaard, Alito, Roth, Lewis, McKee, Circuit Judges) denying petition for in banc rehearing by Appellant Richard A. Cole, filed. (rmg)

Docket as of May 27, 1997 11:19 am